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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 930

IRA LEE BURCH,

Petitioner,

vs.

THE HIBERNIA BANK, RICHFIELD OIL CORPORATION, HANCOCK OIL COMPANY, JOSEPH H. RUSSELL, HENRIETTA S. RUSSELL, JOSEPH H. RUSSELL, JR., Trustee, HARVEY A. RUSSELL and HUBBARD S. RUSSELL,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal, State of California, Second Appellate District

CARL HOPPE
2610 Russ Building
San Francisco 4, California
Attorney for the Petitioner

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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Petition for a Writ of Certiorari to the District Court of Appeal, State of California, Second Appellate District

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that the writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered on November 30, 1956. The District Court of Appeal affirmed a judgment of the Superior Court for the County of San Luis

Obispo in which it was ordered that several demurrers to the complaint of petitioner, as amended, were sustained, without leave to amend. The ground was that the complaint does not state facts sufficient to constitute a cause of action against the respondents in that it shows on its face that the claim of petitioner is barred as *res judicata* by a previous state court judgment.

CITATIONS TO OPINIONS BELOW

The minute order of the state Superior Court (Appendix A, R. 36) is not reported. The opinion of the District Court of Appeal (Appendix B) is reported at 146 A.C.A. 470, 304 P.2d 212.

JURISDICTION

Jurisdiction of this Court is invoked under United States Code, Title 28, Section 1257(3), it appearing that the final judgment was rendered by the highest court of the State of California in which a decision could be had and claiming a title, right, privilege or immunity, especially set up or granted under the Constitution and Statutes of and authority exercised under the United States.

The judgment of the District Court of Appeal was made and entered on November 30, 1956 (Appendix B), rehearing was denied on December 27, 1956, and the Supreme Court of the State of California denied hearing on January 23, 1957. This petition is being filed within the ninety day period provided by U. S. Code, Title 28, Section 2101(c).

QUESTIONS PRESENTED

1. Where a composition of creditors made pursuant to farmer-debtor proceedings under the bankruptcy laws of the United States and confirmed by a United States District Court provides a detailed plan of arrangement involving

premises mortgaged and owned by the farmer debtor and fails to maintain specifically the lien of an outstanding mortgage, is not a mortgage foreclosure sale made subsequent to confirmation and under a power of sale contained in the mortgage absolutely void and of no legal effect?

2. Where, in approving a composition of creditors under farmer-debtor proceedings under the bankruptcy laws, a United States District Court dismisses the farmer-debtor proceedings upon the condition that no proceedings be brought to enforce any liens upon the property of the farmer debtor during a three year period of time, is not a private foreclosure deed executed in contravention of the order of dismissal absolutely void and of no legal effect?

3. If the answer to either, or both, of the foregoing questions is in the affirmative, does a state court have the power to deprive an oil lessee, claiming under the farmer debtor, of his right to oil located upon the mortgaged premises by sustaining demurrers to a complaint without leave to amend upon the ground that the action is barred by a prior state court action to quiet title:

a. Where the action to quiet title was commenced during the pendency of the arrangement approved under the bankruptcy laws and during the term of a subordination agreement providing for a condition subsequent which might defeat the lease and which had not come into being at the time of commencement of the action to quiet title;

b. Where the judgment in the action to quiet title was obtained by default and granted relief not asked in the prayer of the complaint; and

c. Where the complaint alleges facts showing that the judgment in the action to quiet title was obtained by fraudulent representations and by threats?

STATUTORY PROVISIONS INVOLVED

The statute involved is Section 75 of the bankruptcy laws C. 541, as added March 3, 1933, C. 204, 47 Stats. 1470 (now U. S. Code, Title 11, Section 203). Portions of Section 75, as in effect at the pertinent period, provided:

> Section 75(c) "* * * a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. * * *."
>
> Section 75(g) "An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after but not before (1) it has been accepted in writing by a majority in number of all creditors whose claims are affected, which number shall represent a majority in amount of such claims, and (2) the money or security necessary to pay all debts which have priority unless waived, and in case of a composition, the consideration to be paid by the farmer to his creditors has been deposited in such place as shall be designated by and subject to the order of the court."
>
> Section 75(i) "The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. * * *"
>
> Section 75(k) "Upon its confirmation a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided,* That such composition or extension shall not reduce the amount of nor impair the lien of any secured creditor, but shall affect only the time and method of its liquidation."

Section 75(l) "Upon the confirmation of a composition the consideration shall be distributed under the supervision of the conciliation commissioner as the court shall direct, and the case dismissed: * * * Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the farmer and his property during the period of the extension in order to protect and preserve the estate and enforce through the conciliation commissioner the terms of the extension proposal. The court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the court, set the same aside, reinstate the case, and modify the terms of the extension proposal."

Section 75(n) "The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

Section 75(o) "Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court: * * *

'(2) Proceedings for foreclosure of a mortgage on land * * * or for recovery of possession of land;'"

STATEMENT OF THE CASE

This action involves about 70 square miles of the famous Cuyama oil fields in San Luis Obispo and Santa Barbara Counties in California.

Petitioner's complaint asked the state Superior Court to grant him possession and restitution of his oil leasehold on Cuyama Rancho, to award him money damages for withholding the leasehold and to award him the value of petroleum which respondents and their privies removed from Cuyama (R. 2, 15-16). As a matter of course, petitioner filed a single amendment to this complaint (R. 18).

The Superior Court (R. 36) sustained demurrers (R. 22, 29, 31), *without leave to amend,* on the ground that the complaint does not state a cause of action because a previous judgment was *res judicata* (See Appendix A).

The state District Court of Appeal affirmed (Appendix B). Petitioner sought rehearing, which was denied. Petitioner then sought a hearing in the state Supreme Court which was denied. Justice Carter was of the opinion that hearing should have been granted.

Petitioner, an oil prospector, became interested in Cuyama on August 23, 1930. At that time, he obtained, with another, an oil lease of 3100 acres of Cuyama from Edward Cebrian and Ralph J. Cebrian, the owners of Cuyama (R. 3). Subsequently, on May 29, 1934, petitioner alone obtained a second oil lease covering 44,730 acres of Cuyama (R. 2-3). This later lease is the one involved in this litigation. This second lease was to continue until May 29, 1954 (a period of twenty years after the date thereof) and for "so long thereafter as oil or gas could be produced in paying quantities" (R. 18). Oil was located in paying quantities on

or about January 1, 1948 (R. 12-13) and is now being produced. Hence this lease by its pleaded terms is still in effect unless legally terminated.

At all times since May 29, 1934, Burch was ready, willing and able to perform his obligations under the oil and gas lease of May 29, 1934, and his performance was prevented only by the acts of defendants (R. 20), respondents to this petition.

Burch at all times had confidence and hope that he would be able to locate petroleum on Cuyama and he prospected continuously from May 29, 1934 until December 1938 (R. 7-10) but without locating oil in paying quantities up to that time (R. 9-12).

In December 1938, for reasons which will appear later in this petition, respondent Hibernia under a claim of superior title[1] evicted Burch and refused to permit him to prospect further for petroleum (R. 12).

Petitioner's predictions, hopes and beliefs all bore fruit in less than 10 years after eviction, e.g. on or about January 1, 1948, when one Hadley located oil in paying quantities on Cuyama (R. 12-13).

Respondents' claims of superior title in Cuyama have a superficial seeming of reality. The claims spring from two mortgages which the Cebrians granted to respondent Hibernia in 1930 and 1932, respectively (R. 4). These mortgages post-dated the first lease, but were prior to Burch's second lease here in suit. At the time Burch obtained his second lease, these two mortgages had been in default, and Hibernia had already given notice of its election to sell Cuyama (R. 4-5). It is manifest, without further pleading, that if Burch could be successful in locating oil on Cuyama that

1. Petitioner urges that the claim of superior title is spurious in that the foreclosure deed forming the basis for respondents' claims of superior title is void and of no legal effect, this petition, pp. 9-12.

such a find would have inured both to the benefit of the landowners and to that of Hibernia, thereby enabling the landowners to pay off the mortgages and Hibernia to obtain satisfaction of its indebtedness. Accordingly, as pleaded, Hibernia, in order to induce Burch further to prospect Cuyama, excepted from the operation of the lien of its mortgages all petroleum produced by Burch, his successors and assigns, upon the condition that petroleum in paying quantities be produced prior to May 29, 1937 (R. 5). This was less than the full term of the lease which required such production by May 29, 1954 (R. 18).

On March 11, 1935, during the pendency of this period of subordination, Hibernia caused to be executed to itself, under a power of sale contained in the mortgages, a foreclosure deed[2] (R. 7). On May 11, 1937, Hibernia represented to Burch that it had foreclosed the mortgages and that the May 29, 1937 termination date recited in the subordination agreement was in effect (R. 7). Burch relied upon this representation and asked Hibernia for more time to prospect for petroleum (R. 8). By threats of cancellation and termination of his lease and by threats of eviction, Hibernia persuaded Burch to quitclaim his interest in Cuyama and to permit Hibernia to quiet title and Hibernia in turn promised to permit Burch to prospect until March 9, 1938 (R. 9). Burch accepted the proposition and on June 17, 1937, executed a quitclaim deed to Hibernia and placed it in escrow with the understanding that the deed was to be delivered to Hibernia if Burch did not discover petroleum by March 9, 1938 (R. 9). On September 21, 1937, Hibernia commenced an action to quiet title. Burch defaulted (R. 9-10).

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2. This deed is the key by which Hibernia obtained the pleaded advantages over petitioner. Although it seems to be valid, the complaint alleges facts making the deed void under the bankruptcy laws, this petition, p. 9-12.

Burch continued to prospect for oil, but didn't locate any in paying quantities by March 9, 1938 (R. 9). Hibernia advised Burch that his interest in Cuyama was irrevocably lost and that it would not extend the lease. Hibernia also caused the quit claim deed to be recorded on March 18, 1938 (R. 10). Burch still had faith that petroleum in paying quantities was located on Cuyama and asked for still further time. As a new proposition, Hibernia negotiated a new lease with Burch of 6000 acres of Cuyama, and in exchange extracted from Burch an acknowledgment that Hibernia was the sole owner in fee simple of Cuyama and that possession of Cuyama was to be surrendered to Hibernia. Hibernia also required Burch and his wife to execute and to deliver a second quit claim deed (R. 11). In December of 1938, as pointed out above, Hibernia refused to permit Burch to prospect further for petroleum (R. 12). Hibernia then, on June 10, 1940, obtained a favorable decree in the quiet title action (R. 10-11). On October 2, 1940, Hibernia conveyed Cuyama, except the coal and minerals thereon, to respondent Hubbard S. Russell (R. 12). On October 3, 1940, Hibernia recorded the second quit claim deed from Burch (R. 11-12) and on December 12, 1941, it conveyed to said Russell the coal and minerals (R. 12). Then, as pointed out above, on January 1, 1948, one Hadley, a prospector, located petroleum in paying quantities. Thereafter all of the respondents, save Hibernia, jointly and severally removed or caused to be removed from Cuyama the petroleum located thereon. Hibernia encouraged such respondents and made it possible for such respondents to remove such petroleum.

It appears from the complaint that the foregoing seeming adverse claim of title is more apparent than real. The foreclosure deed which is the fountain head of the respondent's claim of title is alleged to be void and of no legal effect.

Petitioner claims a superior right which arose under the bankruptcy statutes of the United States and under authority exercised by a United States District Court under said statutes which in turn made the foreclosure deed void. Petitioner did not learn of his superior right until May 3, 1950 which is 11½ years after he was evicted, 10 years after the default quiet title judgment was entered and 2 years after oil was located in paying quantities. Petitioner asked the state courts to declare the mortgage foreclosure deed to be absolutely void and without legal effect. As pleaded, petitioner's right is claimed under a composition of creditors and an order of the Federal District Court confirming the composition—of which he had no knowledge because he was not a party.

After the mortgages to Hibernia were declared to be in default and after Hibernia, in 1934, subordinated the lien of its mortgage to petitioner's lease subject to a condition subsequent, Ralph Cebrian conveyed his interest in Cuyama to Edward Cebrian. Edward Cebrian, on August 23, 1934, filed a petition and schedule for a composition of creditors pursuant to the farmer-debtor provisions of the bankruptcy laws of the United States (R. 6—erroneously referred to in the complaint as the Fraser-Lemke Act). The United States District Court promptly entered an order restraining Hibernia from selling Cuyama under the power of sale contained in the mortgage or any other authority at all until the further order of the court (R. 18).

In order to obtain title to Cuyama without further proceedings under the farmer-debtor petition, Hibernia concluded an arrangement with Edward Cebrian and with certain creditors of Cebrian (R. 18). Under this arrangement (R. 18-19):

1. Hibernia agreed to accept $450,000 in satisfaction of its claim and lien against Cuyama;

2. In lieu of $450,000 in cash, Hibernia agreed to accept from Cebrian "a deed conveying clear title" to Cuyama, subject only to taxes, and Cebrian agreed to convey Cuyama to Hibernia;

3. Hibernia agreed to execute and to deliver to Cebrian a three year lease together with an option to purchase; and

4. Cebrian, Hibernia, and other creditors agreed that the farmer-debtor proceedings could be dismissed.

It is to be noted that petitioner's lease was in full effect at this time and was superior to the lien of Hibernia's mortgages, subject to being defeated only by the condition subsequent that Burch might not locate oil by May 29, 1937, this by virtue of the subordination agreement (R. 5). It is further to be noted that the composition contains no provision preserving the lien of the mortgages until May 29, 1937, or indeed for any other period. By this composition, therefore, it would appear that Hibernia voluntarily placed itself in the shoes of Cebrian at least so far as the Burch lease is concerned, including Cebrian's obligation to permit Burch to prospect for 20 years and of course Cebrian's rights to the oil royalties.

On January 17, 1935, the District Court confirmed the foregoing arrangement and dismissed the proceeding upon the condition, among others, that "no action be taken by any person, firm or corporation to attach or execute upon the property of Edward Cebrian, real or personal, nor to enforce any liens thereon" (R. 6-7) during the operation of the lease executed by Hibernia to Cebrian (R. 19).

The complaint alleges that Hibernia did not obtain any modification of the order of January 17, 1935, but that Hibernia nonetheless refused to proceed with the arrange-

ment as confirmed by the court order, with the exception that:

1. Hibernia did cancel its mortgage notes;
2. Hibernia did satisfy the debts due to Hibernia;
3. Hibernia did grant Cebrian, on or about January 1, 1935, a three year lease of Cuyama, together with an option to purchase; and
4. Hibernia did obtain from Cebrian a quit claim deed of Cuyama (R. 19-20).

It was *after* the composition was entered into, *after* the composition was approved, *after* the foregoing injunctive order was made and *during* the operation of the lease that Hibernia caused to be executed to itself the mortgage foreclosure deed in question. Although neither the composition nor the judgment contained any provision preserving the lien of the mortgage or permitting the foreclosure of such lien and although the judgment prohibited the foreclosure, Hibernia presumed to obtain the foreclosure deed and then to use it as the tool to obtain petitioner's default in the action to quiet title and to obtain the quit claim deeds (This petition, p. 8).

The complaint alleges that petitioner knew nothing of the composition of creditors or of the order of the United States District Court when Hibernia, in 1937, represented to him the fact of foreclosure and on that basis obtained the first quit claim deed (R. 7-8). The complaint alleges that Hibernia did know that the foreclosure deed was void because Hibernia had satisfied the mortgage and because the court order prohibited it, but that it still represented to Burch that Hibernia had foreclosed the mortgage and that Burch's interest in the oil was about to be lost (R. 8). The complaint further alleges that Burch relied upon and believed the representations of Hibernia (R. 8).

The complaint further alleges that Burch learned for the first time, on or about May 3, 1950, that the debts secured by the mortgages had been satisfied, and that there was in existence a court order which prohibited the foreclosure of the mortgages (R. 15). This knowledge came about in response to an investigation suggested by one Colville on or about January 9, 1950, when Colville, then a stranger to Burch, advised Burch that he thought that Burch had a continuing interest in the petroleum located upon Cuyama (R. 15). Up to January 9, 1950, Burch never suspected that Hibernia had misrepresented the status of the title of Cuyama (R. 15).

REASONS FOR GRANTING THE WRIT

The petitioner urges that the writ of certiorari is authorized by U. S. Code, Title 28, Section 1257(3), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Petitioner contends that his position that the foreclosure deed is void and of no legal effect is a title, right, privilege or immunity specially set up or claimed under the Constitution and statutes of the United States and under authority

exercised under the Constitution and the bankruptcy statutes.

Petitioner's claim is specially set up in the complaint upon which the demurrers were sustained without leave to amend. The respondents demurred generally that the complaint did not state facts sufficient to constitute a cause of action and, except for the defense of *res judicata,* the Superior Court deemed it unnecessary to decide the other grounds of demurrer (R. 36-37, Appendix A). Petitioner called the same allegations to the attention of the District Court of Appeal, and with respect to them he stated that "the foreclosure deed was void on either one or two separate and independent bases", e.g., that "it was prohibited by the order of the Federal District Court", and that "the lien was lost by entering into the composition of creditors" (Appellant's opening brief, page 24, discussed therein, pages 19-24). In petitioner's reply brief, he stated that this was "the crux of the case" (Appellant's reply brief, page 40, discussed therein, pages 20-31). The District Court of Appeal, which was the highest court to which the petitioner could take this issue, decided only the matter of *res judicata* and stated: "It is not necessary, therefore, to examine the validity of the foreclosure sale" (Appendix B, pp. 16-17).

Although the Appellate Court failed to pass on this issue, the petitioner, in seeking a hearing in the Supreme Court, preserved his point that the foreclosure deed was void, pointing to the provisions of the complaint in which the allegations as to the void foreclosure deed were made (Appellant's petition for hearing, pages 4-8); pointing to the discussion in appellant's opening brief before the District Court of Appeal (appellant's petition for hearing, pages 9-10); and pointing to the fact that "plaintiff feels that he is unable to improve his pleading by way of amend-

ment (upon the ground) based upon the invalidity of the foreclosure deed" (Appellant's petition for hearing, page 26).

Indeed, respondents concede that the claim that the foreclosure deed is void is the "essence of the claim of fraud" and the "core of Burch's case" (Brief of Respondent The Hibernia Bank in DCA, p. 28). The other respondents adopted the Brief of Hibernia.

The several bases upon which petitioner asserts that this federal right warrants review by this Court are set forth below.

1. In failing to hold that the composition of creditors, later approved by the United States District Court, destroyed the lien of the Hibernia mortgage, the state courts deprived petitioner of a title, right, privilege or immunity specially set up or claimed under statutes of or authority exercised under the United States.

Petitioner invokes U. S. Code Title 11, Section 203(k) which provides:

> "Upon its confirmation, a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby * * *"

In *Myers v. Internat. Trust Co.* (1927), 273 U. S. 380, it is said, p. 383:

> "* * * It is settled * * * that the respective rights of the bankrupt and the creditors are fixed by the terms of the offer; and that upon the confirmation of the composition they get what they 'bargained for,' and no more."

Judge Learned Hand, then District Judge, *In re Ullman*, S.D.N.Y. 1910, 180 F.944, 945, said:

> "A composition is at once a settlement and a discharge."

It might be thought that Hibernia was excused from performing the composition agreement because Cebrian could not in fact convey "clear title" as distinguished from "a deed * * * conveying clear title" (R. 19) in view of the outstanding lease to Burch. But it appears to be settled as a matter of law that the original debt and the lien were both forever lost because they were not retained by the express terms of a composition in bankruptcy. This rule is applied even in those cases where the debtor is unable to perform the commitments which he made under the composition.

McDonald v. H. E. Taylor and Company, 1911, 128 N.Y.S. 1048;

In re Lilienthal, 9th Cir., 1919, 256 Fed. 819, 821;

Jacobs v. Fensterstock, 1923, 236 N.Y. 39, 139 N.E. 772;

In re Mirkus, 2nd Cir., 1923, 289 Fed. 732, 734; and

In re Klein, 2nd Cir., 1927, 22 F.2d 906.

2. In failing to declare the mortgage foreclosure deed void because it was prohibited by an order of the United States District Court ordering that "no action be taken * * * to enforce any lien" upon the property of Cebrian during the period in question, the state courts deprived petitioner of a title, right, privilege or immunity specially set up or claimed under the statutes of or authority exercised under the United States.

It has been shown that Hirbernia caused the mortgage foreclosure deed to be executed on March 11, 1935 (R. 7). It has also been shown that Cebrian still owned Cuyama on March 11, 1935, since he did not quit claim his interest in Cuyama to Hibernia until March 13, 1935 (R. 20). It has been shown that the operation of the 3 year lease commenced on or about January 1, 1935. Therefore, there can

be no genuine factual dispute that the foreclosure deed in question was prohibited by the order in bankruptcy.

Petitioner submits that the foreclosure deed, therefore, is absolutely void as a matter of law.

Kalb v. Feuerstein, 1940, 308 U.S. 433, is analogous, both on facts and on procedure. In *Kalb,* a mortgagee purchased the premises of a farmer debtor at a judicial sale while the farmer-debtor proceedings were pending. After the mortgagor had been dispossessed, he brought an action in equity in the state courts for restoration of possession. As in the case at bar, the state courts sustained demurrers and dismissed the action. On certiorari, this Court reversed. Although the state court rested its decision on state grounds, this Court said, page 439:

> "* * * The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."

At page 443, the Court said:

> "The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, the Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because that state court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property—to the extent based upon the court's actions—were all without authority of law."

The distinctions between this case and *Kalb* appear to be immaterial. In *Kalb*, the sale was judicial and here it was private. In *Kalb*, the sale occurred during the pendency of the proceedings and here it occurred during the pendency of the composition approved by the proceedings. In *Kalb*, the farmer complained and here a privy of both the farmer and the creditor complained.

In the first place, it is well stated *In re Jersey Island Packing Co.*, 9th Cir. 1905, 138 Fed. 625, 627:

> "* * * Everyone who takes a mortgage, or deed of trust intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract."

In the second place, it is said *In re Hasie*, D. C. Texas, 1913, 206 Fed. 789, 791:

> "* * * Where the power is revoked or suspended, a sale made thereafter by the trustee under a deed of trust acting under the power without the sanction of an order of court is void."

Other authorities holding void foreclosure deeds obtained in contravention of an order in bankruptcy include:

Bakersfield Abstract Co. v. Buckley, 9th Cir., 1938, 100 F.2d 530;

In re Potts, 6th Cir., 1944, 142 F.2d 883, 888;

Meyer v. Rowen, 10th Cir., 1950, 181 F.2d 715; and

Boyer v. Bourn, N.D. Mo. E.D., 1945, 61 F. Supp. 715, 720.

3. Petitioner's assertion of federal rights was plainly and reasonably made in the state proceedings and his rights are not be be defeated under the name of local practice in

sustaining the demurrer (a) without leave to amend, and (b) because the action to quiet title judgment was deemed *res judicata*.

It is said in *Davis v. Wechsler*, 1923, 263 U.S. 22, 24:

> "* * * Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The state courts may deal with them as they think proper in local matters but they cannot treat is as defeating a plain assertion of federal right. The principal is general and necessary. Ward v. Love County, 253 U.S. 17, 22. If the Constitution and laws of the United States are to be enforced, the Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. Creswill v. Grand Lodge Knights Pythias, 225 U.S. 246."

An examination of the record in this case makes clear that the non-federal grounds are inadequate to support the state court judgment.

In the *first* place, the record discloses that that Superior Court trying the action to quiet title was without jurisdiction as against Burch. The judgment of the District Court of Appeal discloses that the quiet title action was commenced on September 21, 1937 (Appendix B, p. 7). The complaint shows that on September 21, 1937 the petitioner's rights to Cuyama were prior to the lien of the Hibernia mortgage by virtue of the subordination, subject only to being defeated by the delivery and recording of a deed from Burch to Hibernia in the event that Burch did not discover petroleum in paying quantities on or before March 9, 1938 (R. 9), and that said deed was not in fact recorded until March 18, 1938 (R. 10).

It appears to be settled that the right of Hibernia to recover in the action to quiet title depended upon its right at the inception of the suit. So far as the title of Burch is concerned the action was 5½ months premature. The non-existence of a cause of action as against Burch *when the suit started* was a fatal defect to the action to quiet title which could not be cured by the accrual as against him of a cause of action pending suit.

Minneapolis R.R. v. Peoria Ry., 1926, 270 U.S. 580, 586;

American Bonding and Trust Company v. Gibson County, 6th Cir., 1906, 145 Fed. 871.

In the *second* place, the opinion of the District Court of Appeal shows on its face that the complaint asked that title be quieted subject to Burch's lease, whereas the judgment in the action to quiet title did quiet title as against Burch. The opinion of the District Court of Appeal shows that the complaint asked that Hibernia be decreed to be the owner of Cuyama "except only the rights, title, interest or estate of the defendants specifically named in paragraphs (a), (b), and (c) of paragraph III of this complaint" and that the interest of Burch is set forth in said paragraph III (Appendix B, pp. 7-8). The judgment does not quiet title subject to Burch's lease, but on the contrary, stated that none of the defendants "has any right, title, claim or interest therein (in Cuyama) or in any part hereof".

Under the circumstances, the judgment in the action to quiet title was a nullity, being in conflict with the California Code of Civil Procedure, Section 580, which recites:

"* * * The relief granted to the plaintiff if there be no answer, cannot exceed that which he shall have demanded in his complaint; * * *"

In *Balaam v. Perazzo*, 1931, 211 Cal. 375, the defendant Juarez had suffered a default to be taken against him in an action to quiet title and the plaintiff, claiming under Juarez, brought a second action to quiet title against the holders of the judgment in the first action. Plaintiff showed that the judgment was not in accord with the prayer for relief and the trial court and the Supreme Court both held the first judgment to be void. At page 379 the Court said:

> "• • • This fact [the default], however, would not have entitled the plaintiff in that action [the first action] to be granted any relief in excess of that demand in his complaint [citations omitted]."

In *Burtnett v. King*, 1949, 33 Cal. 2d 805, the court said, at page 810, after approving *Balaam*, p. 808:

> "• • • The only issues that can be litigated in a default proceeding are those presented by the complaint."

A complaint filed in 1937 could not present for litigation the issue of Burch's failure to locate oil in 1938.

Other pertinent authorities include:

Swycaffer v. Swycaffer, 1955, 44 Cal. 2d 689, 692-693;
Flores v. Smith, 1941, 47 Cal. App. 2d 253, 260-261;
Lang v. Lang, 1926, 182 Cal. 765, 769;
Staacke v. Bell, 1899, 125 Cal. 309, 312-313; and
Holman v. Vallejo, 1861, 19 Cal. 498, 500.

In its decision the District Court of Appeal relied upon *Burtnett v. King*, 33 Cal. 2d 805 and *Hart v. Richardson*, 134 Cal. App. 2d 242. These cases do not support the decision. In *Burtnett*, the court held a default judgment void for failure to comply with Section 580. In *Hart*, the court refused to apply Section 580 because the parties stipulated

in writing with respect to the disposition of the property upon the entry of a default divorce decree.

In the third place, the complaint shows that Hibernia obtained the default of Burch by fraudulent representations and undue influence. In this regard, the complaint shows that the default was obtained as follows:

(a) Hibernia represented to Burch the fact that Hibernia had foreclosed the mortgage and that the May 29, 1937 termination date recited in the Subordination Agreement was in effect (R. 7);

(b) Hibernia represented that Burch's interest in the petroleum located upon Cuyama Rancho would be lost if Burch did not locate oil in paying quantities within the time provided in the Subordination Agreement (R. 7-8);

(c) Hibernia made threats of cancellation and termination of the lease and made threats of eviction (R. 8-9);

(d) Hibernia knew that the mortgage foreclosure deed was void because prohibited by the court order and because the debt was satisfied (R. 8);

(e) Burch did not know and had no reason to know that the Federal Court order prohibited the enforcement of any liens on Cuyama and did not know and had no reason to know that the debt secured by the mortgage had been satisfied (R. 8);

(f) Burch relied on the representations of the bank and at all times between May 29, 1937 and January 9, 1950, believed the bank's representations that Burch's interest in the petroleum located on Cuyama had been lost, except for such extensions of his lease which Hibernia saw fit to grant and which existed by the grace of Hibernia (R. 8);

(g) Burch relied upon the aforementioned fraudulent representations and believed that he no longer had any interest in Cuyama Rancho (R. 9);

(h) Burch never at any time prior to January 9, 1950 suspected that Hibernia misrepresented the status of the title of Cuyama Rancho (R. 15).

The complaint also shows that there was no actual adjudication of the matter here in controversy in that the Superior Court did not decide in the earlier quiet title action the issue of whether or not the composition arrangement and the U. S. District Court order voided the foreclosure deed; on the contrary the complaint alleges that "Hibernia did not disclose to the Superior Court and, indeed, concealed the fact that the Federal District Court had prohibited the execution of said foreclosure deed" (R. 11).

In holding that this prior judgment was *res judicata* in light of the foregoing pleaded circumstances, the District Court of Appeal based its demurrer upon insubstantial grounds at variance with long-established equitable and legal principles. In a more recent case than the case at bar, the Court in a well-considered dictum in *Pietro v. Pietro*, 1957, 147 ACA 931, said at p. 935:

> "Plaintiff alleged that Madeline and her attorney represented to him that they would return the property in question to him if he did not contest the divorce suit, otherwise they would force the property into foreclosure and it would be lost to him; that he relied on the representation; and that the fear of losing the property caused him not to contest the divorce suit. Considered by itself, this allegation would be impressive . . ."

The only reason *Pietro* refused to follow the stated dictum was that other evidence, of which the Court could take judicial notice, established beyond doubt the falsity of the allegations quoted above. In the case at bar, on the contrary,

there is no evidence of any kind tending to cast the slightest doubt upon the veracity of petitioner's pleading.

If the pleadings of petitioner and the demurrers be considered in the light of:

Seeger v. Odell, 1941, 18 Cal. 2d 409, 415-416;

Young v. The Young Holdings Corp., Ltd., 1938, 27 C.A. 2d 129, 145;

Slenderup v. Broadway State Bank, 1933, 219 Cal. 593, 596-597;

Flood v. Templeton, 1907, 152 Cal. 148, 155-158;

Bacon v. Bacon, 1907, 150 Cal. 477, 491-492; and

Spencer v. Vigneaux, 1862, 20 Cal. 422, 448;

it will become clear that the demurrer sustained without leave to amend because of *res judicata* lacks sufficient substance to deprive plaintiff of his claimed right under the bankruptcy laws of the United States.

CONCLUSION

Petitioner prays that the petition for the writ of certiorari be granted.

Respectfully submitted,

CARL HOPPE

Attorney for Petitioner

(Appendices Follow)

Appendix A

Minute Order of the Superior Court, In and for the County of San Luis Obispo, Entered Monday, June 13, 1955 (R. 36-37).

The Demurrers of the Hibernia Bank; Joseph H. Russell, Henrietta S. Russell, Joseph H. Russell, Jr., as Trustee, Harvey A. Russell, and Hubbard S. Russell; and Richfield Oil Corporation and Hancock Oil Company to the plaintiff's Complaint having heretofore been argued and submitted to the Court for consideration and decision, and the Court having fully considered the same,

IT IS HEREBY ORDERED that defendants' Demurrers be and the same are hereby sustained without leave to amend on the ground set forth in Paragraph IV of each of the said defendants' Demurrers to said Complaint, to-wit: that the Complaint does not state facts sufficient to constitute a cause of action against the said defendants in that it shows on its face that the claims of plaintiff are barred as res judicata by a previous judgment, to-wit: that certain Judgment and Decree made and entered on the 10th day of June, 1940, by the Superior Court of the State of California, in and for the County of Santa Barbara, in that certain action brought by The Hibernia Savings and Loan Association (now known as The Hibernia Bank) against I. Lee Burch.

Defendants attack plaintiff's Complaint in this case by Demurrer upon several grounds. However, inasmuch as the Court has ruled as above stated that the cause of action alleged in said Complaint is barred by a previous judgment, we deem it unnecessary to decide the other grounds of demurrer.

A. E. MALLAGH, *Clerk*

By (signed) BETTY MIDDLECAMP, *Deputy*

Appendix B

In the District Court of Appeal of the State of California
Second Appellate District—Division Three

2 Civil No. 21497

Ira Lee Burch,
Plaintiff-Appellant,
vs.
The Hibernia Bank, Richfield Oil Corporation, Hancock Oil Company, Joseph H. Russell, Henrietta S. Russell, Joseph H. Russell, Jr., Trustee, Harvey A. Russell and Hubbard S. Russell,
Defendants-Respondents.

Appeal from a judgment of the Superior Court of Los Angeles County. Ray B. Lyon, Judge. Affirmed.

Carl Hoppe and James M. French for Appellant.

Richard Raoul-Duval, Tobin & Tobin, Moses Lasky, Brobeck, Phleger & Harrison, for Respondent The Hibernia Bank; Marlon F. Schade, O'Melveny & Myers, Sidney H. Wall and Everett B. Clary for Respondents Richfield Oil Corporation and Hancock Oil Company; Twitchell & Rice and W. C. Rice for Respondents Joseph H. Russell, Henrietta S. Russell, Joseph H. Russell, Jr., Trustee, Harvey A. Russell and Hubbard S. Russell.

OPINION

Appeal by plaintiff from a judgment of dismissal entered after an order sustaining defendants' demurrers to his complaint as amended without leave to amend. The action

is for resortation of a leasehold, and for damages for alleged fraud arising out of an oil lease acquired by plaintiff in 1934 covering Cuyama Rancho in San Luis Obispo and Santa Barabara counties.

The complaint as amended alleges:

In 1930 Edward and Ralph Cebrian were the owners of Cuyama Rancho, to be referred to as Cuyama. On August 23, 1930 they executed to I. E. Martin an oil and gas lease covering 3,100 acres.[1] Martin assigned his interest in the lease to plaintiff.

On September 24, 1930 the Cebrians executed a mortgage covering Cuyama to defendant Hibernia Bank, to be referred to as Hibernia. On December 27, 1932 they executed a second mortgage covering Cuyama to Hibernia. On April 11, 1934 the mortgages were in default, and on that date Hibernia gave notice of the breach and of its election to sell.

On May 29, 1934 the Cebrians executed to plaintiff an oil and gas lease of all of Cuyama except the 3,100 acres. The lease was for 20 years and so long thereafter as oil or gas could be produced in paying quantities.[2]

On June 23, 1934 Hibernia, in order to induce plaintiff to prospect Cuyama, excepted from the operation of the liens of its mortgages all petroleum produced on condition that petroleum in paying quantities be produced prior to May 29, 1937.

On August 18, 1934, during the pendency of the foreclosure proceedings, Ralph Cebrian conveyed his interest in Cuyama to Edward Cebrian. On August 23, 1934 Edward Cebrian filed a petition and schedule for a composition of creditors in the United States District Court, pursuant

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1. All documents relevant to this action were duly recorded.

2. Plaintiff does not assert any rights under the lease of August 23, 1930. He asserts rights solely under the lease of May 29, 1934.

to the farmer-debtor provisions of the federal bankruptcy law. On August 23, 1934 the United States District Court entered an order restraining Hibernia from selling Cuyama under the power of sale contained in the mortgage of September 24, 1930 or under any other authority at all until further order of the court.

On January 3, 1935 Hibernia concluded a composition with Edward Cebrian and with certain creditors of his in which:

1. Hibernia agreed to accept $450,000 in satisfaction of its claim and lien against Cuyama.

2. In lieu of $450,000 in cash, Hibernia agreed to accept a deed from Edward Cebrian conveying clear title to Cuyama subject only to taxes, and Edward Cebrian agreed to convey it to Hibernia.

3. Hibernia agreed to execute and deliver to Edward Cebrian a lease of Cuyama for the term of three years, with an option to purchase at any time during the term of the lease for $450,000 plus interest and taxes.

4. Hibernia, Edward Cebrian, and the creditors agreed that the farmer-debtor proceedings be dismissed.

On January 17, 1935 the United States District Court entered an order confirming the foregoing arrangement and dismissing the farmer-debtor proceeding on the condition, among others, that "no action be taken by any person, firm or corporation . . . to attach or execute upon the property of Edward Cebrian, real or personal, nor to enforce any liens thereon during the operation of the lease executed by Hibernia to Edward Cebrian."

Hibernia cancelled its mortgage notes and satisfied the debts due to it, and on January 1, 1935 granted Edward

Cebrian the 3-year lease and the option to purchase the property at any time during the term of the lease for $450,000.

On March 11, 1935 Hibernia caused to be executed to itself a deed purporting to foreclose the mortgage of September 24, 1930 under the power of sale contained therein. On March 15, 1935 Edward Cebrian executed a quitclaim deed conveying Cuyama to Hibernia.

From May 29, 1934 until May 29, 1937 plaintiff fully performed all of the terms and conditions of the leases of August 23, 1930 and May 29, 1934 without locating petroleum in paying quantities on or before May 29, 1937.

On May 11, 1937 Hibernia represented to plaintiff it had foreclosed the mortgage, that the May 29, 1937 termination date recited in its subordination of June 23, 1934 was in effect, and plaintiff's interest in the petroleum would be lost if he did not locate oil in paying quantities within the time provided therein. At the time Hibernia made the representations it knew the mortgage foreclosure deed was void because the federal court order prohibited such foreclosure and because it had satisfied the debt secured by the mortgage. Plaintiff relied on the representations and at all times between May 29, 1937 and January 9, 1950 he believed his interest in the petroleum located on Cuyama had been lost except for the extensions granted by Hibernia; he did not know and had no reason to know the federal court had entered any order prohibiting the enforcement of any liens against Cuyama or that the debt secured by the mortgage had been satisfied.

Plaintiff was confident that with further prospecting he would be able to locate petroleum on Cuyama and he entreated Hibernia to give him more time. By threats of cancellation, termination, and eviction, Hibernia persuaded

plaintiff to quitclaim his interest and to permit it to quiet the title in exchange for its promise to permit plaintiff to prospect until March 9, 1938 for petroleum in paying quantities. Plaintiff relied on the representations and accepted the offer. On June 17, 1937 plaintiff executed a quitclaim deed to Hibernia which he delivered in escrow with the understanding that it was to be delivered to Hibernia in the event he did not discover petroleum in paying quantities on or before March 9, 1938.

Hibernia commenced a suit to quiet title, naming plaintiff and others as parties defendant. Plaintiff permitted a default to be entered against him and "cooperated with Hibernia to make possible the successful completion of the action to quiet title."

Plaintiff continued to prospect for petroleum but failed to locate any in paying quantities by March 9, 1938. Immediately thereafter Hibernia advised him that his interest in Cuyama was irretrievably lost. Again plaintiff asked for further time to locate petroleum. On March 11, 1938 Hibernia advised him it would not extend the lease and it recorded the quitclaim deed.

After March 9, 1938 Hibernia negotiated a new lease with plaintiff covering 6,000 acres included in Cuyama and in exchange extracted from plaintiff an acknowledgment that Hibernia was sole owner of Cuyama in fee simple and that possession was to be surrendered to it, and it required plaintiff and his wife to execute a quitclaim deed dated May 21, 1938. At all times after December 1938 Hibernia refused to permit plaintiff to prospect on Cuyama for petroleum.

On June 10, 1940 Hibernia obtained a decree of the superior court of Santa Barbara County quieting title to the property against plaintiff and others. In order to

obtain the judgment, Hibernia offered in evidence the foreclosure deed and the quitclaim deed of June 17, 1937, and the court relied on them in entering its judgment. Hibernia concealed from the court that the United States District Court had prohibited execution of the foreclosure deed and the fact that it had obtained the quitclaim deed from plaintiff by means of the representations, promises, and acts alleged.

By deed dated October 2, 1940 and by a correction deed dated December 12, 1941, Hibernia conveyed Cuyama to defendant Hubbard S. Russell. In January 1948 one George Hadley, acting for defendant Norris Oil Company, located petroleum in paying quantities on Cuyama. On information and belief, the remaining defendants thereafter caused petroleum having a value in excess of $100,000,000 to be removed therefrom. On information and belief, the value of the petroleum remaining on Cuyama is $1,000,000,000.

Plaintiff never at any time prior to January 9, 1950 suspected that Hibernia misrepresented the status of the title of Cuyama. At that time one Charles J. Colville, then a stranger to plaintiff, called on him and advised him that he thought plaintiff had a continuing interest in the petroleum located on Cuyama. Plaintiff told Colville some of the facts pleaded in the complaint and the two commenced a detailed investigation. On May 3, 1950 plaintiff for the first time learned that the debts secured by the mortgages had been satisfied prior to May 29, 1937 and that there was in existence a court order which prohibited the foreclosure of the mortgage. It was not until after that date that plaintiff learned for the first time that his oil and gas leases were in full force and effect on May 29, 1937, the date which Hibernia had falsely represented to be the termination of his interest in the lease of May 29, 1934.

Plaintiff has at all times since May 29, 1934 been ready, willing, and able to perform his obligations under the lease of that date and his performance has been prevented only by the acts of defendants.

Plaintiff prays for possession and restitution of his leasehold on Cuyama; for $1,000,000,000 damages for withholding the leasehold; and for $100,000,000 damages for the value of the petroleum which defendants have removed.

Defendants' demurrers were sustained without leave to amend on the ground the complaint does not state facts sufficient to constitute a cause of action in that it shows on its face plaintiff's claims are barred as res judicata by the judgment entered June 10, 1940 by the superior court of Santa Barbara County in the suit to quiet title brought by Hibernia against plaintiff and others. The ground on which the trial court sustained the demurrers is fatal to plaintiff's case.

The complaint in the present action identifies the suit to quiet title brought by Hibernia. The complete judgment roll in the latter suit is included in the briefs and the parties agree it is to be considered a part of the complaint in the present action. The defense of res judicata may be raised by demurrer where the facts which give rise to it appear in the complaint. (*Weil v. Barthel,* 45 Cal. 2d 835, 837; *Willson v. Security-First Nat. Bk.,* 21 Cal. 2d 705, 710; *Freeze v. Salot,* 122 Cal. App. 2d 561.)

Hibernia filed its suit to quiet title on September 21, 1937. It named plaintiff and one D. G. Donahue, among others, as parties defendant. The complaint in that suit alleged Hibernia was the owner in fee simple and in possession of Cuyama; in subparagraph A of paragraph III, that each defendant claimed some interest therein but that such claim was unfounded, and no defendant had any interest

except by lease dated May 29, 1934 executed by Edward and Ralph Cebrian, Burch is lessee of Cuyama for the purpose of mining and operating for oil and gas; Hibernia gave its written consent to the lease; the consent was given on the condition "that the said lease should cease and terminate if oil in paying quantities was not produced within three years from the date of said lease, to-wit: within three years from the 29th day of May, 1934"; on Auguset 20, 1937 Hibernia by a written instrument granted Burch an extension of the lease of May 29, 1934 until March 9, 1938, wherein Burch agreed that Hibernia "shall, on the 10th of March, 1938, be the owner of the real property . . . said lease dated May 29, 1934, shall terminate and end on said 9th day of March, 1938, unless oil or gas in paying quantities . . . shall on or before said 9th day of March, 1938, be produced"; and Burch was the lessee "under a valid and subsisting lease" of the property covered by the lease of May 29, 1934 "subject, however, to termination without notice on the 9th day of March, 1938, in the event . . . that oil or gas in paying quantities . . . shall not have" been produced by that date. The complaint prayed that: 1. Each defendant be required to set forth the nature of his claim and that all adverse claims be determined. 2. It be decreed none of the defendants had any right, title, interest or estate in any part of Cuyama "except the rights, title, interest and estate of the defendants specifically named in subparagraphs (A), (B) and (C) of paragraph III of this complaint, all as particularly set forth in said Paragraph III." 3. It be decreed Hibernia was the owner of Cuyama in fee simple and each defendant be enjoined and debarred from asserting any claim whatsoever in or to the property and premises adverse to Hibernia "except only the rights, title, interest or estate of the defendants specifically named in subpara-

graphs (A), (B) and (C) of paragraph III of this complaint, all as in said paragraph III particularly set forth." Burch did not answer the complaint.

The defendant Donahue filed a cross-complaint in the Hibernia suit to quiet title. On June 24, 1938, Burch, after the time in which he had to locate oil or gas on Cuyama had expired, filed a verified answer to the cross-complaint of Donahue in which he alleged he had "no right, title, interest, equity or estate in or to said real property or any part or parcel thereof under said lease dated the 29th day of May, 1934."[3]

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3. Burch's answer to the cross-complaint read: "denies that he claims or asserts any estate or interest in or lien upon the property and premises described in the said cross-complaint, or any part thereof, adverse to said defendant and cross-complainant, said D. G. Donahue, and in that behalf alleges that by a lease dated the 29th day of May, 1934, from Edward Cebrian and Ralph J. Cebrian, the then record owners of a parcel of real property which included the property and premises described in said cross-complaint, was leased to this defendant and cross-defendant and said lease was consented to by said The Hibernia Savings and Loan Society, the then holder of a mortgage upon said real property, and that the said consent of said bank to said lease was upon the condition that oil in paying quantities should be discovered upon said property within three years from said date, to-wit: Within three years from the 29th day of May, 1934, and that by an agreement in writing said bank subsequently extended the time of the operation of said lease to the 9th day of March, 1938, upon condition that oil in paying quantities should be discovered upon said property by said named date; that oil in paying quantities was not so discovered upon said property by said date and that in accordance with the written agreement of this defendant and cross-defendant and said The Hibernia Savings and Loan Society, this defendant and cross-defendant and his wife, Fay Burch, made, executed and delivered to said The Hibernia Savings and Loan Society a quit claim, quitclaiming and conveying to said The Hibernia Savings and Loan Society, all their right, title, interest, equity and estate in and to said land, which included the said property and premises described in the said cross-complaint of said cross-defendant D. G. Donahue, and that this cross-defendant has no right, title, interest, equity or estate in or to said real property or any part or parcel thereof under said lease dated the 29th day of May, 1934."

The findings in the suit to quiet title recite that the case came on for trial on the complaint and various answers, including plaintiff's answer to Donahue's cross-complaint. The court found and concluded that each and every lease to Cuyama, and to any portion thereof, "and each and every renewal or extension thereof, has lapsed, and that none of the said lessees . . . have any right, title, claim or interest in or to said property, or any portion thereof." The judgment, dated June 15, 1940, was that Hibernia was the owner in fee simple and in possession of Cuyama and that none of the defendants "has" any right, title, claim, or interest therein, or any part thereof. The judgment became final.

Plaintiff asserts the judgment in the suit to quiet title was a nullity because the relief granted was not identical with the prayer of the complaint. He argues the court had no jurisdiction to enter a judgment speaking as of the date of its entry; that its only jurisdiction was to enter a judgment in the identical language of the complaint, speaking as of the date of the filing of the complaint.

The rule that a default judgment in excess of the prayer of a complaint is void has no application to the Hibernia suit to quiet title. *Burtnett v. King,* 33 Cal. 2d 805, states the reason for the rule (p. 808):

> "The essence of the policy underlying section 580 of the Code of Civil Procedure, *supra,* is that in default cases, defendant must be given notice of what judgment may be taken against him—a policy underlying all precepts of jurisprudence and protected by our constitutions. If a judgment other than that which is demanded is taken against him, he has been deprived of his day in court—a right to a hearing on the matter adjudicated."

Hart v. Richardson, 134 Cal. App. 2d 242, is in point. A default judgment in a divorce case included a provision that certain property was the plaintiff's separate property. The

defendant in the divorce action later sued the plaintiff in that action with respect to title to his property, arguing the property provision of the divorce judgment was void because there had been no prayer to declare the property to be separate property. The contention was rejected and the former judgment was held res judicata because a stipulation had been filed in the divorce action that the property was separate. The court held (p. 246):

> "The situation was changed by the stipulation, and this plaintiff was not without notice of the form of judgment that might be expected. In effect, he consented to the judgment which was entered. He should be estopped from questioning the effect of his stipulation."

Burch had until March 9, 1938 in which to discover oil or gas. The judgment in the suit to quiet title was entered long after March 9, 1938. The fact that at the date of the judgment Burch had not discovered oil or gas in paying quantities by March 9, 1938 was not disputed. At the date of the judgment the record before the court affirmatively showed Burch had no interest in Cuyama. Burch had notice of the judgment that would be taken against him. He was not misled into believing that no judgment decreeing his lease at an end would be entered. He affirmatively consented to the judgment that was entered.

The judgment in the Hibernia suit to quiet title speaks of the date of entry. Generally a judgment in a suit to quiet title takes effect on the rights and titles of the parties to the suit as they exist at the time of the rendition of the judgment and not as they existed at the commencement of the suit or before that time. (*Barstow San Antonio Oil Co. v. Whitney*, 205 Cal. 420, 421; 49 C.J.S. 876, § 446.)

Plaintiff claims that as between Hibernia and himself the court could not look to the denials and allegations in his

answer to Donahue's cross-complaint. The denials and allegations of the answer constituted admissions against interest which the court had the right to consider in rendering judgment. (19 Cal. Jur. 2d 147, § 407. Cf. *Dolinar v. Pedone*, 63 Cal. App. 2d 169, 176.)

Plaintiff contends the complaint states facts sufficient to constitute a cause of action in fraud. The fraud alleged is that Hibernia represented to plaintiff it had foreclosed its mortgage and that the May 29, 1937 termination date recited in its subordination of June 23, 1934 was in effect, and his interest in the petroleum would be lost if he did not locate oil in paying quantities within the time provided therein, when it knew at the time that the mortgage foreclosure was void because the order of the United States District Court had prohibited such foreclosure and because it had satisfied the debt secured by the mortgage.

The complaint also alleges that in order to obtain judgment in the suit to quiet title, Hibernia offered in evidence the foreclosure deed and the quitclaim deed of June 17, 1937, and the court relied on them in entering judgment; and that Hibernia concealed from the court the United States District Court had prohibited execution of the foreclosure deed and the fact that it had obtained the quitclaim from plaintiff by means of the representations, promises, and acts alleged.

Plaintiff argues the composition destroyed Hibernia's lien; that it obtained title under a void foreclosure deed and in turn conveyed title on the void deed to the remaining defendants; that the use of the deed to his "detriment constituted the lever by which [he] was defrauded." Defendants argue the fraud alleged was intrinsic, not extrinsic; that the complaint shows the foreclosure sale of 1935 was not enjoined by the United States District Court but, on the contrary, was ordered; that the injunctive part of the order

confirming the composition was not to go into effect until after the composition had been consummated; in any event the alleged facts do not constitute fraud at all. Plaintiff replies that the facts constitute fraud and that it was extrinsic.

A court of equity under proper circumstances will set aside a judgment obtained by fraud. (29 Cal. Jur. 2d 106, § 157.) The fraud must be extrinsic and collateral. (*Westphal v. Westphal,* 20 Cal. 2d 393, 397; *Huron College v. Yetter,* 78 Cal. App. 2d 145, 149.) *Gale v. Witt,* 31 Cal. 2d 362, defines extrinsic fraud (p. 365):

> " 'The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination [Citations.] Where the fraud practiced is collateral to and outside of the court so that a party is, because of such fraud or concealment, effectively deprived of presenting his case or all of his defense, it is extrinsic and equity will give relief. . . . [T]o constitute extrinsic fraud, there must have been some representation or concealment by the defendant which prevented the plaintiff from having his day in court. . . . These decisions follow the long established principle that the use of forged documents or perjured testimony constitutes intrinsic fraud and cannot be made the basis for an attack upon the judgment by way of relief in equity."

The concealment by a party of evidence which, if disclosed, would tend to overthrow his case is not extrinsic fraud. *Hogan v. Hogan,* 131 Cal. App. 2d 281, says (p. 284):

> "It is settled in this state that a judgment will not be set aside because it is based upon perjured testimony or because material evidence is concealed or suppressed, that such fraud both as to the court and the party against whom judgment is rendered is not fraud extrinsic to the record for which relief may be had."

Hibernia's alleged failure to introduce in evidence in the suit to quiet title the order of the United States District Court, or to make any reference to it, does not constitute extrinsic fraud. The allegations as to what it did and did not do in that suit are in effect that the judgment was obtained by perjury, false evidence, and concealment of other evidence. The alleged concealment went to the merits of the cause submitted for judgment. If there was fraud it was intrinsic, not extrinsic. (See *In re Griffith*, 84 Cal. 107, 112-3; *McLaughlin v. Security-First Nat. Bk.*, 20 Cal. App. 2d 602, 606.) The rule is the same whether the judgment sought to be set aside is a default judgment or rendered after answer and contested trial. (*Horton v. Horton*, 18 Cal. 2d 579, 585; *Westphal v. Westphal*, 20 Cal. 2d 393, 397; *Harvey v. Griffiths*, 133 Cal. App. 17, 22-3).

The representations alleged to have been made to plaintiff by Hibernia prior to the quiet title suit as to its legal position, identical with its claims in the suit, do not constitute extrinsic fraud. (*Jorgensen v. Jorgensen*, 32 Cal. 2d 13, 22-3.) Such alleged representations were merely that Hibernia had a superior title. They were exactly the same representations made to the court in the suit to quiet title. To be extrinsic the fraud must be collateral to the matter which was tried and determined by the court. (*Hanley v. Hanley*, 114 Cal. 690, 693; *Carr v. Bank of America etc. Assn.*, 11 Cal. 2d 366, 374; *Abels v. Frey*, 126 Cal. App. 48, 54.) Two recent cases on all fours are conclusive.

American Borax Co. v. Carmichael, 123 Cal. App. 2d 204, was a suit brought by American Borax Company and the Schorrs to set aside a judgment quieting title in Carmichael. It was claimed the judgment was obtained by extrinsic fraud in that Borax Company and the Schorrs had let judgment go by default on Carmichael's false representation that

the Borax Company had no title at the time it had conveyed a lot to the Schorrs. Demurrer was sustained without leave to amend. Affirming, the court said (p. 206):

> "The appellants contend that extrinsic fraud was alleged 'as to at least part of the plaintiffs'; that the complaint alleges that the attorneys for Carmichael represented to the Schorrs that the Borax Company had no title to Lot 207 (which the corporation had agreed to sell to them), and because of such misrepresentation the Schorrs made no defense to the former action. . . .
>
> "The complaint was clearly insufficient, as was the offer to amend which appellants say was made. Moreover, no claim is made in the brief that any specified facts exist, and could be alleged, which would disclose extrinsic fraud in that connection. Whether or not these appellants had any rightful interest in the property was the specific question involved in the action in which the judgment was rendered. The fact that this respondent was claiming title, in spite of certain outstanding instruments, presented a factual question but would not constitute extrinsic fraud."
>
> "[P. 208.] With respect to the appellants Schorr it is argued that the complaint alleges that they were misled by a representation made to them by the attorney for the respondent to the effect that the Borax Company had no title to the lot which it had agreed to sell to them. It is stated in the respondent's brief that such a statement was made by respondent's attorney in a letter written to the Schorrs asking for a quitclaim deed from them, and that when they refused to give such a deed they were thereafter served with summons and complaint in the quiet title action. This is not denied in appellants' reply brief. Whether the Borax Company had any interest or title in the property was the issue involved in the former action, the Schorrs knew that this respondent was making a contrary contention, they had the right to defend when later served

with summons, and no extrinsic fraud appears in this connection."

In *Thiriot v. Santa Clara etc. School Dist.*, 128 Cal. App. 2d 548, the plaintiff sought to set aside a judgment in eminent domain whereby the defendant had acquired title from her. She alleged that in the condemnation suit the school district claimed the land was necessary for school purposes; the district and its officers falsely represented to her the land was needed for school purposes only, and induced her to compromise the suit and thereby avoid the trial of that issue; she believed the representations and consented to a decree of condemnation against her without trial of the issues presented by her answer; and if these issues had been tried she would have prevailed. The court held that obviously the alleged fraud pertained to one of the main issues in the condemnation suit and therefore was intrinsic. (Also see *Levinson v. Bank of America,* 126 Cal. App. 2d 122; *Flint v. Hecker,* 143 A.C.A. 870.)

A party who has been given proper notice of an action and who has not been prevented from full participation, has had an opportunity to present his case to the court and protect himself from any fraud attempted by his adversary. Fraud perpetrated under such circumstances is intrinsic. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for an appeal or other direct attack. (*Howard v. Howard,* 27 Cal. 2d 319, 321; *Smith v. Smith,* 125 Cal. App. 2d 154, 163.)

We conclude that the alleged fraud was intrinsic; that the judgment in the suit to quiet title is res judicata as to any claim plaintiff may have had to Cuyama and to prospect for oil or gas thereon, and that it is a bar to the present action. It is not necessary, therefore, to examine the validity of the

foreclosure sale or whether the facts alleged constitute fraud.

Affirmed.

VALLÉE, J.

We concur.

SHINN, P. J.

WOOD, J.

[Endorsed:] Dist. Court of Appeal—Second Dist. Filed Nov 30 1956 J. E. Brown *Clerk*.....

Deputy Clerk